

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

ttg

FILE:

Office: SACRAMENTO

Date: **APR 19 2010**

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Sacramento, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the waiver application will be denied.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse.

The Acting Field Office Director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on his qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel asserts that the applicant's spouse's hardship claim was not properly considered. Counsel states that the applicant's spouse is the primary caregiver for her mother. Counsel states that the applicant's spouse is financially dependent on the applicant because she cannot work while taking care of her mother. Counsel contends that the discretionary determination fails to consider the applicant's equities.

In support of the application, the record contains, but is not limited to, financial documentation, medical documentation, photographs, court dispositions, the applicant's marriage certificate, the applicant's wife's naturalization certificate, and attestations from the applicant, the applicant's spouse and the applicant's father-in-law. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of

conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

The AAO notes that this case arises under the jurisdiction of the Ninth Circuit Court of Appeals. The Ninth Circuit has adopted the “realistic probability” approach, as articulated by the U.S. Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007), to determine whether or not the elements of a statute categorically render the offense a crime involving moral turpitude. *See Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-1007 (9th Cir. 2008). The Ninth Circuit Court of Appeals had previously reserved judgment as to whether it would follow the ruling of the Attorney General in *Silva-Trevino* that adjudicators may look beyond the record of conviction as part of the modified categorical inquiry. *See Marmolejo-Campos v. Holder*, 558 F.3d 903, 915 (9th Cir. 2009). However, this question was implicitly addressed in the recent case *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009). In *Castillo-Cruz*, the Ninth Circuit addressed whether receipt of stolen property under Cal. Penal Code § 496(a) constitutes a categorical crime involving moral turpitude by applying the “realistic probability” test. 581 F.3d at 1161. The Ninth Circuit concluded that California courts have upheld convictions under Cal. Penal Code § 496(a) in cases where there was no intent to permanently deprive owners of their property, and as such, a conviction under the statute is not categorically a crime of moral turpitude. *Id.* The Court then held that the respondent’s conviction was not a crime involving moral turpitude under the modified categorical analysis because the government conceded that there was no evidence in the record establishing that his offense involved an intent to deprive the owner of possession permanently. *Id.* The court cited to its prior precedent that only the record of conviction may be reviewed as part of the modified categorical inquiry, and apparently reviewed only the record of conviction in making this determination. *Id.* (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006)). The AAO interprets the holding in *Castillo-Cruz* as a refusal by the Ninth Circuit to accept the more expansive review allowed by the Attorney General, and will thus restrict its review in this case to only the record of conviction.

The director found the applicant inadmissible for having been convicted of two crimes involving moral turpitude. The applicant has not disputed this determination on appeal.

The record reflects that the applicant was convicted in the Municipal/Superior Court of the State of California, County of Yolo, on February 24, 1997 of felony assault with deadly weapon or force likely to produce great bodily injury in violation of section 245(a)(1) of the California Penal Code (Cal. Penal Code) and felony sexual battery in violation of Cal. Penal Code § 243.4(a). The applicant was sentenced to 36 months probation with the conditions that he serves 231 days in Yolo County Jail and pays various fines (Case No. 96-6650).

Cal. Penal Code § 245(a)(1) (West 1997) provides:

Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to

produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.

The offense underlying the applicant's crime, assault, is defined under the California Penal Code as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240 (West 1997). Section 245(a)(1) of the California Penal Code is divisible in that it can be violated by either the commission of (1) assault with a deadly weapon or instrument other than a firearm or (2) by means of force likely to produce great bodily injury. The record does not indicate the specific subpart the applicant was convicted under. We will first examine whether assault with a deadly weapon or instrument is categorically a crime involving moral turpitude.

The BIA in *Matter of G-R-*, engaged not only in assessing the theoretical possibility but also the realistic probability that assault with a deadly weapon in violation of Cal. Penal Code § 245 would be applied to conduct not involving moral turpitude. 2 I&N Dec. 733 (BIA 1946). The BIA first reviewed California court decisions on convictions for assault with a deadly weapon in violation of Cal. Penal Code § 245 and noted that "the crime is . . . limited to intentional acts and does not include the inflicting of injuries by accident." 2 I&N Dec. 733, 736 (BIA 1946). The BIA further noted that, "There must be actual use or attempt to use the deadly weapon." 2 I&N Dec. at 738. However, the BIA found one case, *In re Rothrock*, 16 Cal.2d 449 (1940), in which assault with a deadly weapon in violation of Cal. Penal Code § 245 was applied to conduct that did not involve moral turpitude. 2 I&N Dec. at 739. *In re Rothrock* involved a disbarment proceeding under the California Business and Professions Code where a conviction for a crime involving moral turpitude constituted cause for disbarment or suspension of an attorney. *Id.* at 739-40. The BIA noted that the court in *Rothrock* "held that assault with a deadly weapon in California does not as a matter of law always involve moral turpitude." *Id.* at 740. The BIA concluded after having "carefully studied the California cases interpreting sections 240 and 245 of the Penal Code," the facts rendered the alien inadmissible for a crime involving moral turpitude. *Id.* at 739-40.

Matter of G-R- indicated that assault with a deadly weapon in violation of the California Penal Code is not categorically a crime involving moral turpitude pursuant to the holding in *Rothrock*. However, the Ninth Circuit Court of Appeals in *Gonzales v. Barber* later distinguished the holding in *Rothrock* and determined that assault with a deadly weapon under the California Penal Code is categorically a crime involving moral turpitude. 207 F.2d 398, 400 (9th Cir. 1953). The Ninth Circuit stated:

In the *Matter of Disbarment of Rothrock*, 16 Cal.2d 449, 106 P.2d 907, 131 A.L.R. 226. However, there the California court was concerned with whether the crime involved such moral turpitude as to reflect upon the attorney's moral fitness to practice law, a state question. Here we are faced with the federal question of whether the crime involves such moral turpitude as to show that the alien has a criminal heart and a criminal tendency- as to show him to be a confirmed

criminal. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9, 68 S.Ct. 374, 92 L.Ed. 433. In the federal law, assault with a deadly weapon is such a crime. *U.S. ex rel. Zaffarano v. Corsi*, supra; *U.S. ex rel. Mazzillo v. Day*, D.C.S.D.N.Y., 15 F.2d 391; *U.S. ex rel. Ciccerelli v. Curran*, 2 Cir., 12 F.2d 394; *Weedin v. Tayokichi Yamada*, 9 Cir., 4 F.2d 455.

207 F.2d at 400; *See Matter of O*, 3 I&N Dec. 193, 197 (BIA 1948)(“But the offense here is not merely *mala prohibita*, it is inherently base, and this is so because an assault aggravated by the use of a dangerous or deadly weapon is contrary to accepted standards of morality in a civilized society.”); *In re Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006)(stating, “assault and battery with a deadly weapon has long been deemed a crime involving moral turpitude by both this Board and the Federal courts, because the knowing use or attempted use of deadly force is deemed to be an act of moral depravity that takes the offense outside the ‘simple assault and battery’ category”).

The Ninth Circuit in *Carr v. INS* determined that “assault upon the person of another with a firearm” in violation of Cal. Penal Code § 245(a)(2) is not a crime involving moral turpitude. 86 F.3d 949, 951 (9th Cir. 1996). However, unlike the decision in *Gonzales v. Barber*, the Ninth Circuit provided no analysis for its decision. Moreover, *Carr v. INS* was decided before the Ninth Circuit adopted the “realistic probability” approach articulated in *Silva-Trevino*, supra. The AAO notes that although not explicitly applying the “realistic probability” test, the BIA in *Matter of G-R-* and the Ninth Circuit in *Gonzales v. Barber* followed the realistic probably approach by viewing whether a case exists in which a conviction for “assault with a deadly weapon” was applied to conduct not involving moral turpitude. 207 F.2d at 400. The AAO will therefore accept the Ninth Circuit’s finding in *Gonzales v. Barber* and conclude that assault with a deadly weapon or instrument is categorically a crime involving moral turpitude.

Having established that assault with a deadly weapon or instrument is categorically a crime involving moral turpitude, we will next examine the morally turpitudinous nature of the second part of the statute: assault by any means of force likely to produce great bodily injury. In *Matter of P*, the BIA addressed whether a similar statute under the Michigan Penal Code, assault with intent to do great bodily harm less than the crime of murder, is a crime involving moral turpitude.¹ 3 I&N Dec. 5 (BIA 1947). In determining that such conduct is categorically a crime involving moral turpitude, the BIA stated:

Crimes which are accompanied by an evil intent or a depraved motive, generally connote moral obliquity. It has been said that it is in the criminal intent that moral turpitude inheres. Under this generally accepted standard, it seems clear that the offense denounced by the Michigan statute under consideration involves moral turpitude, and as stated, the absence of a showing that a dangerous or deadly weapon was used is not the operative factor in determining the presence or

¹ Section 750.84 of the Michigan Penal Code provides, “Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars.”

absence of moral turpitude. Conceivably, an assault with a dangerous weapon may be committed in such a manner as to preclude an evil intent, and therefore baseness or vileness. In short, it is the purpose or intent which accompanied the perpetration of the crime, and the manner and nature by which it is committed, which determines moral turpitude. . . . There can be little or no difference then, so far as moral turpitude is concerned, between the offense of assault with intent to do great bodily harm less than the crime of murder, and assault with a deadly weapon.

3 I. & N. Dec. 5, 8; *See People v. Elwell*, Cal.App.3d 171, 177 (1988)(holding that assault by means of force likely to produce great bodily injury under the California Penal Code was a crime of moral turpitude which could be used for impeachment purposes.). Accordingly, AAO finds that the applicant's conviction under Cal. Penal Code § 245(a)(1) is categorically a crime involving moral turpitude.

Cal. Penal Code § 243.4(a) (West 1997) provides:

Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. A violation of this subdivision is punishable by imprisonment in a county jail for not more than one year, and by a fine not exceeding two thousand dollars (\$2,000); or by imprisonment in the state prison for two, three, or four years, and by a fine not exceeding ten thousand dollars (\$10,000).

In *Samudo*, the BIA noted that, "we have recognized that assault and battery offenses may appropriately be classified as crimes of moral turpitude if they necessarily involved aggravating factors that significantly increased their culpability." 23 I&N Dec. at 971. Cal. Penal Code § 243.4(a) includes the types of "aggravating" factors that would cause us to find that the conduct at issue represents an inherently base, vile, or depraved act. Unlawfully restraining an unwilling victim to engage in sexual acts represents a vile and depraved act. In *People v. Chavez*, the California Court of Appeal found that the commission of the lesser culpable offense, misdemeanor sexual battery in violation of Cal. Penal Code § 243.4(d)(1), is a crime involving moral turpitude. 84 Cal.App.4th 25 (2000). The court stated, "the degrading use of another, against her will, for one's own sexual arousal is deserving of moral condemnation. We hold that sexual battery is a crime of moral turpitude." 84 Cal.App.4th 25, 30. It should be noted that a conviction under Cal. Penal Code § 243.4(a) encompasses conduct that is significantly more depraved than a conviction under Cal. Penal Code § 243.4(d)(1) because the statutory elements include the unlawful restraint of the victim. Accordingly, the AAO finds that the applicant's felony conviction under Cal. Penal Code § 243.4(a) is categorically a crime involving moral turpitude.

In sum, the applicant's convictions for "assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury" and "sexual battery" render him inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act as an alien having been convicted of two crimes involving moral turpitude.

The AAO notes that the record contains a copy of an Order Under Penal Code Sections 1203.4 and 17(b)(3) issued by the Yolo County Superior Court on May 30, 2001. The court ordered the applicant's February 24, 1997 felony convictions under Cal. Penal Code §§ 243.4(a) and 245(a)(1) reduced to misdemeanors pursuant to 17(b)(3), and his guilty or nolo contendere plea and the verdict or finding of guilt set aside and a plea of not guilty entered. The court further ordered the complaint against the applicant dismissed pursuant to the provisions of Cal. Penal Code § 1203.4.

Cal. Penal Code § 1203.4 (West 2001) provides, in part:

- (a) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted

The AAO finds that a dismissal under Cal. Penal Code § 1203.4 does not expunge the applicant's convictions for immigration purposes. Under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. In *Matter of Pickering*, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). It appears from the record that the dismissal of the applicant's convictions was by a state rehabilitative statute. There is nothing in the record to show that it was based on a defect in the conviction or in the proceedings

underlying the conviction. Thus, the applicant remains “convicted” within the meaning of section 101(a)(48)(A) of the Act.

Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

. . . .

(1)(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. Hardship to the applicant himself is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative’s family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

The AAO notes that in *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, “the most important single hardship factor may be the separation of the alien from family living in the United States”, and that, “[w]hen the BIA fails to

give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” (Citations omitted.)

The AAO notes, however, that U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court defined “extreme hardship” as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The record contains an affidavit dated June 18, 2007 from the applicant’s spouse, a native of Mexico and a naturalized U.S. citizen. The applicant’s spouse states in her affidavit that in June 2002 her mother was injured while working as a nut sorter at [REDACTED]. She states that her mother has since lost her mobility and is suffering from depression. She states that in 2005 she quit her job to become her mother’s primary caretaker. She states that in May 2007 her father was diagnosed with Bells Palsy and has diabetes. She states that she has since become the sole caretaker of both of her parents. She states that she prepares her parents’ meals, performs housekeeping duties, takes care of their errands, and drives her mother to appointments.

The applicant furnished a letter dated May 7, 2007 from [REDACTED], a clinical psychologist. [REDACTED] states in his letter that he is treating the applicant’s spouse for depression and panic anxiety. He states that the applicant’s spouse’s mother has psychiatric disorders and is also his patient. He states that the applicant’s spouse is her mother’s caregiver and assists her mother with basic daily functions, which includes dispensing medications, transporting to medical appointments and providing emotional support.

The applicant also furnished his mother-in-law’s medical evaluations, dated June 7, 2005 and September 12, 2006. The June 27, 2005 evaluation was conducted by [REDACTED], a board certified psychiatrist, as a psychiatric worker’s compensation evaluation. [REDACTED] assessed the applicant’s mother-in-law’s employment history, family history, physical health and mental health. [REDACTED] diagnosed the applicant’s mother-in-law with having dysthymic disorder, pain disorder and partner relational problems. The September 12, 2006 evaluation was conducted by [REDACTED], a board certified orthopedic surgeon, as a complex comprehensive medical legal evaluation for submission to the State Compensation Insurance

Fund. ██████████ assessed the applicant's mother-in-law's physical injuries and determined that she cannot perform her job and is a qualified injured worker. ██████████ noted that he believes "the major problem here is depression."

Finally, the applicant furnished a document entitled, "Aftercare Instructions" from Sutter Davis Hospital stating that the applicant's father-in-law was diagnosed with Bell's Palsy and Diabetes. A June 13, 2007 letter from the applicant's father-in-law states that he is currently unemployed and depends on his daughter (the applicant's spouse) for support. He states that the applicant's spouse takes him and his wife to medical appointments, handles their errands, and performs their housework. He states that he is physically and mentally unable to care for his wife.

In denying the application, the director stated that the applicant's spouse only demonstrated the hardship her parents would suffer if the applicant was removed from the United States. *See Decision of the Acting Field Office Director, dated August 13, 2007.* The AAO notes that hardship to the applicant's spouse's parents will be considered insofar as it results in hardship to the applicant's spouse. The AAO finds that the foregoing documentation demonstrates the strong family ties the applicant's wife has with her parents in the United States. However, the applicant's spouse has failed to demonstrate that her siblings would not care for their parents if she departs the United States. The record shows that the applicant's spouse has two sisters who reside in the United States. The applicant's spouse states in her affidavit that she is close to her siblings and sees them on the weekends for family dinners. She states that her sisters have taken the responsibility to assist her parents with their monthly house payments and some of their bills. These statements indicate that the applicant's spouse's siblings are involved in family matters. There is nothing in the record to show that the applicant's spouse's siblings would be unable to care for their parents if the applicant's spouse relocated with the applicant to her native country of Mexico.

The next issue to be addressed is whether the applicant's spouse would suffer extreme hardship if she remained in the United States without the applicant. The applicant's spouse states in her affidavit that she depends on the applicant for financial support. She states that the applicant pays for their rent, utilities, food, car payments and insurance. She states that she depends on the applicant emotionally because she feels drained from caring for her parents and it is overwhelming for her to see her parents deteriorate.

The AAO will consider financial hardship as a factor contributing to extreme hardship if it is demonstrated by the record. The supporting evidence filed with the applicant's Affidavit of Support (Form I-864) consists of an employment verification letter, a 2005 tax return, and 2005 Wage and Tax Statements (Forms W-2). The applicant's Form W-2 shows that in 2005 he earned \$37,847.67. An attachment to the Form I-864 states that the applicant's spouse ceased working in July 2006. The record shows that the applicant's spouse is no longer employed because she provides full-time care to her parents. However, there is nothing in the record to show that she would by necessity continue with the task of caring for her parents full-time if the applicant departs the United States. As previously noted, the applicant's spouse has indicated that her sisters have taken the responsibility to assist her parents with their monthly house payments and some of their bills. It is not clear from the record whether they would be able to

also partake in some of the daily duties of caring for their parents, or whether they could afford to hire a full-time nursing assistant. The record does not contain affidavits from the applicant's spouse's siblings describing their capacity to help care for their parents. The record also lacks evidence demonstrating that the applicant would be unable to continue supporting the applicant from abroad. Therefore, the AAO cannot conclude that the applicant's spouse would suffer financial hardship if the applicant's waiver application is denied and she remains in the United States.

The AAO acknowledges that the applicant's spouse will experience emotional hardship if she remains in the United States without the applicant, but the applicant has failed to demonstrate that this hardship, when combined with other hardship factors, will be extreme. The AAO recognizes the significance of family separation as a hardship factor, but concludes that the hardship demonstrated by the record is the common result of removal or inadmissibility and does not rise to the level of extreme hardship. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant's spouse, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h)(1)(B) of the Act.

The AAO notes that even if the applicant had satisfied the requirements of section 212(h)(1)(B) of the Act, his waiver application would not be granted as the AAO finds that he is not deserving of a favorable exercise of the Secretary's discretion.

The regulation at 8 C.F.R. § 212.7(d) states in pertinent part:

Criminal grounds of inadmissibility involving dangerous or violent crimes. The Attorney General [Secretary], in general, will not favorably exercise discretion under section 212(h)(2) of the Act . . .in cases involving violent or dangerous crimes, except...in cases in which the alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. . . .

As stated, the applicant was convicted on February 24, 1997 of felony assault with deadly weapon or force likely to produce great bodily injury in violation of Cal. Penal Code § 245(a)(1) and felony sexual battery in violation of Cal. Penal Code § 243.4(a).

Cal. Penal Code § 245(a)(1) (West 1997) provides:

Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.

Cal. Penal Code § 243.4(a) (West 1997) provides:

Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. A violation of this subdivision is punishable by imprisonment in a county jail for not more than one year, and by a fine not exceeding two thousand dollars (\$2,000); or by imprisonment in the state prison for two, three, or four years, and by a fine not exceeding ten thousand dollars (\$10,000).

From the plain language of these statutes, it can be concluded that the applicant has been convicted of violent crimes pursuant to 8 C.F.R. § 212.7(d). Therefore, even if the applicant satisfied the extreme hardship requirement of section 212(h)(1)(B) of the Act, he would still be subject to the heightened hardship requirement of showing exceptional and extremely unusual hardship to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.